IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1198

MARY LOUISE McCLUNG,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PHILIP J. HIRSCHKOP
LEONARD S. RUBENSTEIN
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-5555
Attorneys for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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No.

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COMMONWEALTH OF VIRGINIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Mary Louise McClung respectfully prays for a Writ of Certiorari to the Supreme Court of Virginia to reverse its decision affirming the conviction of petitioner for second degree murder in the Circuit Court of Henrico County, Virginia.

OPINIONS BELOW

No Opinions were issued by the Courts below.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Virginia denying a Writ of Error and Supersedeas and affirming the judgment of the Henrico County Circuit Court was entered on November 30, 1976. The final judgment of conviction in the Henrico County Circuit Court was entered February 17, 1976 (Case No. F-969). This petition was timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court violated the s[illegible]ndards established in *North Carolina v. Pearce* and *Chaffin v. Stynchcombe* by refusing, without explanation, to conform petitioner's sentence by a jury upon re-trial to the sentence imposed in her initial trial, where:

a. The court ordered a pre-sentence report and held a pre-sentence hearing to consider the propriety of the greater sentence imposed by the second trial jury; and where

b. The court denied petitioner the ability to avoid the risk of a higher sentence upon retrial by compelling her to undergo a trial by jury.

2. Whether petitioner's rights to effective assistance of counsel and to due process of law were violated by the court's failure to inquire into petitioner's competency to stand trial, notwithstanding that the court had before it medical evidence of petitioner's amnesia which prevented petitioner from testifying to facts which may have proved she was acting in self-defense against rape.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of the Virginia Statutes listed below are set forth in the Appendix.

§§ 18.1-21, 18.1-23
§§19.1-192, 19.1-22-229, 19.1-291, 19.1-292
§§ 19.2-2, 19.2-299, 19.2-303
§§ 53-272, 53-278.1

STATEMENT OF THE CASE

On the evening of May 11, 1972, petitioner, a 46 year old woman, was at home attending household chores. At about 8 P.M., Richard Davis managed to gain entry into

her apartment without petitioner's permission and against her will. Although petitioner had previously been engaged to marry Davis, she had some months before broken off the engagement because of his violent behavior and abusive sexual demands. Tr. I, 155-159. After entering, Davis, who had been drinking, told petitioner he wanted to talk with her, but petitioner asked him to leave. He persisted, and then demanded to have sexual relations with her. Tr. I, 167. Upon her refusal, he grabbed her and dragged her along the floor to the foot of the stairs leading to the bedroom. Tr. I, 167-168. From that point on, petitioner can remember nothing of the events of the night of May 11 except a vague impression of having been in a police car.

The same evening, a neighbor heard shots from petitioner's apartment; at trial the neighbor testified that shortly thereafter, petitioner had come to his apartment and told him that she had shot Davis. Tr. I, 52. (Petitioner has no memory of making any such statement). Later that evening, Davis was found dead by the police in petitioner's bedroom. He was completely naked except for his socks and lying face up on petitioner's bed. Photographs taken by the police at the scene showed some of Davis' clothes on a chair and some on the floor; they also showed a woman's clothing on the floor. Petitioner was arrested and charged with murder. Prior to her arrest that night, petitioner had never been convicted of, or arrested for, any crime.

The First Trial

In May, 1972, prior to her first trial, the Circuit Court of Henrico County ordered an examination of petitioner to determine whether she was mentally competent to plead and stand trial. She was committed to Central State Hospital in Virginia under the provisons of Va. Code §19.1-228 (1973 Supp.) and eventually found

competent by the examining physicians. No further proceedings on this matter were held before or during trial.[1]

Petitoner was then tried by jury in the Circuit Court of Henrico County. Because of her impaired memory, she could offer no testimony concerning her actions, or those of Davis, in the period immediately prior to his death. At the conclusion of the trial, the jury convicted petitioner of second degree murder and pursuant to its power under Va. Code §§19.1-291 (1960) and 19.1-292 (1960), sentenced petitioner to the minimum sentence of five years in prison. Va. Code §18.1-23 (1960). Petitioner appealed her conviction to the Supreme Court of Virginia. The court reversed because the trial court had failed to instruct the jury on voluntary manslaughter. *McClung v. Commonwealth*, 215 Va. 654, 212 S.E.2d 290 (1975).

The Second Trial

Petitioner was retried on the original charge in Henrico County Circuit Court before the same judge who had presided at her first trial. Petitioner sought to be tried without a jury, but the judge exercised his prerogative under Va. Code §19.1-192 (1960) and had petitioner tried before a jury.

Prior to her second trial, no examination or inquiry of any kind was ordered or conducted to determine petitioner's competence to plead or stand trial, even though petitioner's psychiatrist had shortly before had her hospitalized. During the trial, facts were elicited concern-

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[1] Petitioner's first attorney in this matter (who did not represent her at trial) arranged for an examination of petitioner by the Adult Psychiatric Clinic of University of Virginia Hospital, Charlottesville, Virginia. Following a lengthy examination of petitioner, the three examining physicians concluded that she was not competent to stand trial. This report, however, was never made a part of the formal record in the trial.

ing her impaired mental condition. Petitioner testified that she had no memory of any of the events of the night of May 11, 1972, between the time she was dragged across the floor by the deceased and the time she was in the police vehicle, Tr. I, 168; that doctors had attempted to restore her memory; and that she had spoken to psychiatrists appointed by the state and one retained by her, but could nevertheless not recall the incidents. Tr. I, 169-170. On cross-examination, the defects in her memory were further explored, and it was apparent that her memory loss extended not only to the events of the evening of May 11, 1972, but to events in the succeeding weeks. Tr. I, 175-180.

Dr. James Knopp, a psychiatrist who had been treating petitioner, elaborated on petitioner's amnestic symptoms in his testimony. He testified that, based on his understanding of petitioner's mental condition (which he classified as "disassociated reaction"), he was of the opinion that she could well have suffered an amnestic period, i.e., one of blank memory. Tr. II, 219, 229-230. According to his testimony, on the night of May 11, petitioner could well have been "acting under some kind of stress which was a great stress for her regardless of what it might have been to other people, and could well have had an amnestic or period of blank memory . . ." Tr. II, 221. On cross-examination, Dr. Knopp affirmed that petitioner was "a likely suspect" for amnesia. Tr. II, 222.

Despite this testimony at trial, the court made no further inquiry into petitioner's amnesia as it bore on her competence to stand trial, nor did it order a hearing to determine whether petitioner's lack of memory seriously impaired her ability to stand trial or to aid in the preparation of her defense.

At the end of the trial, the jury, which knew of the prior trial, and possibly of the prior sentence as well[2], sentenced petitioner to a term of ten years in prison. Following the return of this verdict, petitioner moved the court to arrange for a pre-sentence report and to have a pre-sentence hearing, the jury verdict notwithstanding. Tr. III, 81. The trial court granted the motion, arranged for a pre-sentence report, and held a pre-sentence hearing. After the hearing, however, the court refused to alter the jury's sentence, refusing as well to explain or justify this refusal except to state that it did not intend to disrupt the jury's sentence. Tr. (sentencing) 50-51.

THE ISSUES BELOW

After sentencing, petitioner's counsel verbally noted an appeal, which was acknowledged by the Court. Tr. (sentencing) 51. The question whether petitioner's sentence in the second trial violated the standards set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) was raised by petitioner in a timely Notice of Appeal and Assignment of Error, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia. Thereafter she timely filed a Petition for a Writ of Error and Supersedeas to the Supreme Court of Virginia with respect to the judgment rendered by the Circuit Court of Henrico County. On November 30, 1976, the Supreme Court of Virginia rejected her Petition and refused her Writ of Error and Supersedeas. *See* Appendix 1a.

The question whether petitioner was competent to stand trial at the time of the second trial was not raised

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[2]A number of the jurors on the panel knew the Commonwealth's Attorney personally, and others may well have read newspaper accounts of the first trial.

below. The right to be subject to trial only if competent, however, cannot be waived, *Pate v. Robinson*, 383 U.S. 375 (1966), and is so fundamental to the fairness of the criminal process that this issue may be decided even though petitioner did not raise it below. *See Anderson v. United States*, 417 U.S. 211, 217 n.5 (1974), where the Court stated: "This rule [against hearing issues not raised below] is not without its exceptions, however, particularly in criminal cases where appellate courts can notice errors seriously affecting the fairness or integrity of judicial proceedings. *See United States v. Atkinson*, 279 U.S. 157, 160 (1936). *See also Hormel v. Helvering, supra* [312 U.S. 552 (1941)] at 557." *See also, Terminiello v. Chicago*, 337 U.S. 1, 5-6 (1949).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS ISSUES CENTRAL TO THE APPLICATION OF *NORTH CAROLINA v. PEARCE* AND *CHAFFIN v. STYNCHCOMBE* IN THE CONTEXTS OF TRIAL COURT REVIEW OF JURY SENTENCING AND OF NON-WAIVABLE JURY TRIALS.

A. Where the Trial Court Orders a Pre-Sentence Investigation and Holds a Pre-Sentencing Hearing but then Refuses, Without Stating Reasons, to Conform the Jury's Senctence to that Issued in the First Trial, the Court Should Confirm that *Pearce*, not *Chaffin*, Governs.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court held that a defendant who successfully appealed a conviction from a bench trial could not, upon re-trial before a judge, receive a greater sentence in the second trial than he had in the first unless the judge provided affirmative reasons for imposing the harsher sentence.

Subsequently, in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court held that the *Pearce* limitation did not apply to jury sentencing unless it could be shown that the jury knew of the prior sentence. Though the rules established by the Court in the two cases differed, a single consideration underlies each: that there be no vindictiveness in sentencing upon re-trial. A similar concern is apparent in *Colten v. Kentucky*, 407 U.S. 104 (1972), where it was held that a de-novo trial in different court is not likely to produce vindictiveness and in *Blackledge v. Perry*, 417 U.S. 21 (1974), where the Court held that the bringing of a felony charge in the second trial after a misdemeanor charge had been brought in the first based on the same offense is likely to be the product of prosecutorial vindictiveness.

These decisions leave open an important question which does or may arise in each jury-sentencing state. That question is whether in a context in which community judgments inherent in jury sentencing are coupled to the practice of tailoring sentences to individual behavior through pre-sentence investigations, the possibility of vindictiveness has been so revived by the judge's reappearance in the sentencing process as to require *Pearce* to govern rather than *Chaffin*.[3] In this case, the answer

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[3] Under present Virginia law, a pre-sentence report is required, upon a defendant's motion, whether tried by judge or jury. Va. Code §19.2-299 (1975). At the time of petitioner's second trial, however, that section was not in effect, *see* Va. Code §19.2-2 (1975); rather, Va. Code §53-278.1 (1974 Supp.) required a pre-sentence report only in bench trials. Nevertheless, in this case the court ordered such a pre-sentence report, stating, "If you all feel that a pre-sentence report would be of assistance to the court . . . I have no objection to it." Tr. III, 82.

The court's actions were clearly permissible under the old statute since Va. Code §53-272 (1960) enabled the court to suspend execution or imposition of sentence in whole or part; indeed,

[Footnote continued]

is clearly compelled by the rationale of each decision, but should be clarified by this Court for those states which retain jury sentencing.

Virginia, like most other states and the federal system, recognizes that the factors which are relevant to consider in sentencing, such as a defendant's background, work history, criminal record and prospect for future productive social life are matters which are not normally admissible into evidence in a trial. Thus, to enhance the fairness of the sentencing process, and to attempt truly to fit the punishment to the individual, it employs the devices of pre-sentence reports and pre-sentence hearings. See Lehrich, *The Use and Disclosure of Pre-Sentence Reports in the United States*, 47 F.R.D. 225 (1969) *Cf.* New York City Board of Correction, *Pre-Sentence Reports: Utility or Futility*, 2 Fordham Urban L.J. 27 (1973). As in the federal system, *see* F.R.Cr.P. 32(c), this information is provided exclusively to the judge, who must evaluate the information presented to him before imposing sentence. Va. Code §53-278.1 (1974 Supp.)

Once the judge accepts this role, however, the danger this Court identified in *Pearce* appears once again, that a judge may be inclined to punish a defendant for having exercised his right to appeal. 395 U.S. at 725. For he truly has, in these circumstances, withdrawn sentencing responsibilities from the jury and assumed them himself. If that were not the case, the pre-sentence report and hearing would be meaningless, a wasteful formality both

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that section closely resembles the new code section to establish the relation between judicial and jury sentencing power, §19.1-303 (1975). The trial court itself acknowledged that it had the power "to change the verdict of the jury as to the punishment." Tr. (sentencing) 50.

Accordingly, whether the old or new version of the pre-sentence report statute was in effect at the time of petitioner's trial is of no consequence.

for the defendant and for the court. To avoid the danger of vindictiveness, the *Pearce* standards must be imposed, requiring the judge to affirmatively state his reasons for a higher sentence and to rely solely on reasons deriving from "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726.

The circumstances of this case are particularly compelling for consideration by this Court in resolving this question. Here, unlike *Pearce*, the same judge presided over the first and second trial. Therefore, the potential for vindictiveness is even more apparent than in *Pearce*, since his errors were responsible for the second trial. And like in *Pearce*, "neither at the time the increased sentence was imposed . . . has the State offered any reason or justification for that sentence beyond the naked power to impose it." 395 U.S. at 726. The Court should therefore grant certiorari on this question.

B. The Court Should Resolve the Relationship Between *Chaffin v. Stynchcombe* and *Singer v. United States* in the context where a Defendant Compelled to Undergo Trial by Jury Incurs a Substantial Risk of a Harsher Sentence on Retrial.

Although the Court could dispose of this case on the grounds stated above, it could instead decide the alternative question, likely to arise again and again, whether a criminal defendant who is victorious on appeal may be compelled to be re-tried before a jury at the risk of a higher sentence. *Singer v. United States*, 380 U.S. 24 (1965) held that absent some special circumstance, a criminal defendant does not have the constitutional right to waive a jury trial where the court or prosecutor de-

mands one. The question is not whether a defendant may be put to a difficult choice in deciding whether to exercise the constitutional right of trial by jury, *see Chaffin v. Stynchcombe*, 412 U.S. at 31, 33 n.21; *Cf. Crampton v. Ohio*, 402 U.S. 183, 213 (1971); *Brady v. United States*, 397 U.S. 742 (1970); it is simply whether the judge's or prosecutor's power to compel a jury trial carries with it a potential for vindictiveness that can only be avoided either by imposing the *Pearce* rule or by permitting the defendant to waive a jury trial as a *Singer* exception.

Here, upon re-trial, petitioner sought to avoid the risk of a higher sentence than the statutory minimum of five years imprisonment she had received in the first trial, so did not seek a jury trial. The trial court, however, forced the jury trial upon her. Petitioner was thus faced with a bleak predicament: exercising her right to appeal and choosing not to plead guilty, had the consequence of risking, under *Chaffin*, upon conviction, a maximum penalty of imprisonment for twenty years. Va. Code §18.1-21 (1960) and §18.1-23 (1960). One can only speculate why the jury trial was compelled, but the likelihood of calculated vindictiveness in requiring a jury must be recognized. Therefore, the *Pearce* limitation on sentencing should apply.

Alternatively, under the circumstances, a defendant should be permitted to waive a jury trial. Unlike in *Singer*, where the defendant merely wanted to expedite matters, the defendant upon re-trial faces a serious risk of increased punishment before a jury. This predicament surely qualifies as one of those "circumstances where a defendant's reason for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Singer v. United States*, 380 U.S. 24, 37 (1965).

It is accordingly necessary for this Court to resolve the precise relationship between *Chaffin* and *Singer*. Unless the *Pearce* limitations apply in the special setting of re-trial in a jury-sentencing state, the need for a criminal defendant to avoid a jury trial, and hence limit the risk of a higher sentence, may be particularly acute. The Court should grant certiorari in this case, and decide whether these factors suffice to restrict the extent of punishment on re-trial, as in *Pearce*, or to create one of the exceptions contemplated by *Singer*.

II.

THE QUESTION WHETHER AN AMNESIAC SHOULD BE EXAMINED TO DETERMINE WHETHER HE IS COMPETENT TO STAND TRIAL PRESENTS A SUBSTANTIAL AND RECURRING QUESTION WHICH HAS NEVER BEEN RESOLVED BY THIS COURT.

A. The Trial Court's Refusal to Hold a Competency Hearing on the Question of Amnesia Violated the Standards set forth in *Pate v. Robinson* and its Progeny.

In *Pate v. Robinson*, 383 U.S. 375 (1966), this Court held that whenever a trial court has any reason to believe that a defendant is or may not be competent to stand trial, it has a duty to inquire into the defendant's competency, and if necessary, order an investigation and hearing. The failure to do so, even without a motionfrom the defendant, is reversible error. Subsequently, in *Drope v. Missouri*, 420 U.S. 162 (1975), the court reaffirmed *Pate*, and adopted the severe but necessary standard that whenever a bona fide doubt exists concerning the defendant's competency, before or during trial, comes to the court's attention, it must make further inquiries to ascertain

whether the defendant is in fact competent to stand trial.[4]

The question never confronted by this Court is whether the same inquiry is necessary where the defendant is amnestic, where his amnesia is connected to other symptoms or behavior which cast doubt on the defendant's competency to stand trial and where the impaired memory precludes a claim of self-defense. Here, petitioner was unable to testify to the facts of a rape which almost surely either took place or was brutally attempted, facts which might have exonerated her behavior completely. Furthermore, the trial court was familiar with petitioner's medical history and heard both petitioner's testimony as to memory loss and psychiatric testimony concerning the possible origins of that amnesia. Under those circumstances, the reasoning in *Pate* and *Drope* appears to require that an inquiry be made.

The vast majority of courts, even before *Drope* was decided, have followed *Wilson v. United States*, 129 U.S. App.D.C. 107, 391 F.2d 460 (1968), in holding that *Pate* requires a threshold inquiry into the nature of the amnesia and its effect on the defendant's ability to mount a defense whenever it appears that the amnesia may prevent the defendant either from rendering effective assistance to the counsel or from otherwise receiving a fair trial. *See, e.g., United States ex rel. Parson v. Anderson*, 481 F.2d 94 (3rd Cir. 1973); *United States v. Borum*, 464 F.2d 896 (10th Cir. 1972); *United States v. Sullivan*, 406 F.2d 180 (2d Cir. 1969); *People v. Francabandera*,

[4]The constitutional standard for competency was established in *Dusky v. United States*, 362 U.S. 402 (1960): "The test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."

33 N.Y.2d 429, 354 N.Y.S.2d 609, 310 N.E.2d 292 (1974); *People v. Stanhope*, 44 Ill.2d 173, 254 N.E.2d 512 (1969). Nevertheless, one federal court and three state courts have implicitly or explicitly denied the applicability of *Pate v. Robinson* to amnestic defendants, and have held instead that a defendant's amnesia does not justify an inquiry by the trial judge into his competency to stand trial. *United States v. Stevens*, 461 F.2d 317 (7th Cir.) *cert. denied*, 409 U.S. 948 (1972); *Fajeriak v. State*, 520 P.2d 795 (Alaska, 1974); *Muench v. State*, 60 Wisc.2d 386, 210 N.W.2d 716 (1973); *Commonwealth ex rel. Cummins v. Price*, 421 Pa. 396, 218 A.2d 758, *cert. denied*, 385 U.S. 869 (1966).

Those cases conflict directly with the Court's decisions in *Pate* and *Drope*. The basis of the Court's competency decisions was the recognition that a criminal defendant should stand trial only if he is able to assist his counsel in the preparation of his defense and to understand the proceedings against him.[5] Consequently, when any serious doubt arises relating to those matters, an inquiry should be made. As the Court stated in *Drope*:

> The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competency to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone, may, in some circumstances, be sufficient. 420 U.S. 162, 180.

[5]Like the state of Illinois in *Robinson* and the state of Missouri in *Drope*, Virginia law provides a method for determining the competency of a criminal defendant which has been held to meet the requirements of *Pate v. Robinson*. *Payne v. Slayton*, 329 F. Supp. 886 (W.D.Va. 1971).

To exclude the amnesiac from those eligible for an inquiry concerning incompetency precludes a fair trial as certainly as such an exclusion would have on a defendant with severe retardation or mental illness. The inability to reconstruct one's own actions, to assist one's counsel and to offer a defense to the prosecution's theory because of an impaired memory renders a fair trial impossible.

To be sure, not every defendant who claims loss of memory is telling the truth; *see*, Lennox, *Amnesia, Real and Feigned*, 10 U.Chi.L.Rev. 298 (1943); nor does every truthful claim of amnesia necessarily inhibit the defendant's ability to assist his counsel and present a defense. But the same is true of defendants who may be in the more traditional sense incompetent. In either event, an inquiry is necessary before proceeding further to trial and verdict. It is that important principle petitioner seeks to establish here. The Court should grant certiorari to eliminate any doubt that the question of amnestic incompetency, which arises with relative frequency in both state and federal courts, is governed by the standards articulated in *Pate v. Robinson* and *Drope v. Missouri*.

B. There is a Need for Uniform Constitutional Standards to Determine in What Circumstances a Criminal Defendant who has Amnesia may be Found Competent to Stand Trial.

Even if certiorari is granted in this case, the Court need not decide what the appropriate standards are for a court to determine when a defendant who lacks memory should be found incompetent to stand trial. Nevertheless petitioner presents the Court with an opportunity to provide guidance to lower courts in formulating such standards. Those standards are necessary because of the varying tests now used by state and federal courts throughout the country in a question of constitutional significance;

and this case provides a narrow context in which to outline such standards.

The most appropriate tests derive from the leading case, *Wilson v. United States*, 129 U.S.App.D.C. 107, 391 F.2d 460 (1968). There, the court rejected a per se rule and instead listed six factors which a court should consider in determining whether a defendant has sufficient ability to assist his lawyer in the preparation of his defense to be found competent. These were:

> (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
>
> (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
>
> (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
>
> (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.
>
> (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
>
> (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.
>
> 391 F.2d at 463, 464 (footnote omitted).

Wilson has been followed in two United States Courts of Appeals, *United States ex rel. Parson v. Anderson*, 481

F.2d 94 (3rd Cir. 1973); *United States v. Borum*, 464 F.2d 896 (10th Cir. 1972) and in at least four states. *People v. Francabandera*, 33 N.Y.2d 429, 354 N.Y.S.2d 609, 310 N.E.2d 292 (1974); *Parson v. State*, 275 A.2d 777 (Del. 1971); *People v. Stanhope*, 44 Ill.2d 173, 254 N.E.2d 512 (1969); *State v. Blake*, 209 Kan. 196, 495 P.2d 905 (1972).

Other courts have applied different standards. For example, the Second Circuit has apparently required the defendant to show a gross memory impairment so that he is unable to consult with counsel, regardless of the presence of other factors which might be relevant. *United States v. Sullivan*, 406 F.2d 180 (2nd Cir. 1969); Arizona has applied the test of whether the memory impairment can be cured. *State v. McClendon*, 103 Ariz. 105, 437 P.2d 421 (1968); and a lower court in New Jersey has held that after examination, if it is found that an amnesiac can comprehend the charges and consult intelligently with his attorney, the amnesia cannot be grounds for finding a lack of competence. *State v. Pugh*, 117 N.J.Super. 26, 283 A.2d 537 (1971). In view of these conflicting standards, each with constitutional overtones, the Court should provide the aid necessary to lower courts to formulate proper guidelines, and adopt the comprehensive tests provided in *Wilson v. United States, supra.*

The *Wilson* standards properly distinguish between those instances in which amnesia will impede the assertion of a defense, and those in which it is unlikely to affect the outcome at all. Where, for example, the physical evidence points inexorably toward the defendant's guilt, and there is little basis to believe the defendant could present a defense even if he were able, amnesia should be no bar to trial. *See, e.g., United States ex rel. Parson v. Anderson*, 481 F.2d 94 (3rd Cir. 1973); *United*

States v. Borum, 464 F.2d 896, 900 n.2 (10th Cir. 1972); *People v. Francabandera*, 33 N.Y.2d 429, 354 N.Y.S.2d 609, 310 N.E.2d 292 (1974). But where, as here, amnesia prevented petitioner from testifying about the attack on her by Davis, and any of her attempts to repulse it, she should not be compelled to stand trial. The Court should grant certiorari to confirm that those standards apply here.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Virginia.

Respectfully submitted,

PHILIP J. HIRSCHKOP

LEONARD S. RUBENSTEIN

108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-5555

Attorneys for Petitioner.

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 30th *day of* November, 1976.

The petition of Mary Louise McClung for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Henrico County on the 17th day of February, 1976, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment for Murder – Case No. F-969), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

Record No. 760772

A Copy,

Teste:

Howard G. Turner, Clerk
by: /s/ Allen L. Lucy

Deputy Clerk

VIRGINIA STATUTES

§ 18.1-21. **Murder, first and second degree, defined.** – Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary is murder of the first degree. All other murder is murder of the second degree. [repealed]

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§ 18.1-23. Second degree; how punished. – Murder of the second degree shall be punished by confinement in the penitentiary not less than five nor more than twenty years. [repealed]

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§ 19.1-192. Trial without a jury in felony cases; pleas. – Upon a plea of guilty in a felony case, tendered in person by the accused after being advised by counsel, the court shall hear and determine the case without the intervention of a jury; or if the accused plead not guilty, with his consent after being advised by counsel and the concurrence of the attorney for the Commonwealth and of the court entered of record, the court shall hear and determine the case without the intervention of a jury. In such cases the court shall have and exercise all the powers, privileges and duties given to juries by §§ 18.1-16 through 18.1-20, 19.1-249, 19.1-251 to 19.1-254 and 19.1-292, or any other statute relating to crimes and punishments. [repealed]

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§ 19.1-227. Accused while insane or feebleminded not to be tried. – No person shall, while he is insane or feebleminded, be tried for a criminal offense. [repealed]

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§ 19.1-228. Raising question of sanity; commitment before arraignment. – If, prior to arraignment of any person charged with crime, either the court or attorney for the Commonwealth or counsel for the accused has reason to believe that such person, because of mental disease or defect, is in such mental condition that he lacks substantial capacity to understand the proceedings against him or to assist in his own defense, and it is necessary for evaluation and observation in order for the court to determine whether such person is mentally

competent to plead and stand trial or understand the proceedings against and assist in his own defense, the court or the judge thereof may, after hearing evidence or the representations of counsel on the subject, commit the accused to Southwestern State Hospital, Central State Hospital, or other State facility designated by the Commissioner of Mental Hygiene and Hospitals for examination, evaluation, observation, and report if it is felt by the court that temporary hospitalization, not to exceed forty-five days, is required for such determination and such commitment shall be under such limitations as the court may order, pending the determination of his mental condition. However, if in the opinion of the court such examination, evaluation and observation can be satisfactorily performed at some other appropriate facility, the court, in its discretion, may order such examination, evaluation, and observation to be performed at such facility other than the hospitals referred to herein and which facility is designated by the Commissioner of Mental Hygiene and Hospitals as being appropriate.

In any case where the court believes that temporary hospitalization of the accused at Southwestern State Hospital, Central State Hospital, or other State facility designated by the Commissioner is necessary for detailed evaluation, examination, and observation, in order for the court to determine whether such person, because of mental disease or defect, is mentally competent to plead and stand trial or assist in his own defense, the court shall appoint a psychiatric committee of one or more physicians skilled in the diagnosis of insanity, and when any person is alleged to be feebleminded, the court may likewise appoint persons skilled in the diagnosis of feebledmindedness, not to exceed three, to examine, evaluate and observe the accused prior to any order of temporary hospitalization as provided herein. The psychiatric committee shall make such investigation of the case as it may

deem necessary and shall reduce its finding or findings to writing and report to the court, the attorney for the Commonwealth, and counsel for the accused the mental condition of the defendant at the time of their examination and their medical opinion as to whether more extensive examination, evaluation, and observation is required. Thereafter, if the court, in its discretion, determines that more thorough examination, evaluation, and observation is desirable, the court may commit the accused to Southwestern State Hospital, Central State Hospital, or other designated facility for additional examination, evaluation, and observation as provided for herein.

Upon committing the accused to Southwestern State Hospital, Central State Hospital, or other designated facility, for more extensive examination, evaluation, and observation, the court shall order that a copy of the complaint or indictment, attested by the clerk, together with the name and address of the attorney for the Commonwealth and the attorney for the accused, the nature of the charge and whether it is a felony or misdemeanor, the name and address of the committing court and judge thereof, a summary of the facts surrounding the alleged crime, the prior criminal record of the accused, if known, the report of the examining psychiatric committee, including a personal history, completed and signed by all members of the examining psychiatric committee, according to the form prescribed by the State Hospital Board, and such other necessary information as may be required by such Board, be forwarded to the receiving hospital. Such information shall be delivered with the accused to the director of the hospital to which the defendant is committed pursuant to the provisions of this section.

Whenever a temporary commitment for a determination of mental condition that requires hospitalization at

Southwestern State Hospital, Central State Hospital, or other designated facility is made as provided for in this section, such determination shall be made within forty-five days of the date the hospital received the accused for such determination or within such additional time, not to exceed thirty days, which may be authorized by the court at the request of the hospital director. Within such time, the appropriate hospital director or his duly designated representative shall report his findings to the court or judge which ordered the commitment, the attorney for the Commonwealth, and the attorney for the accused and such court or judge shall forthwith send for the accused and receive him for trial if the defendant is capable of understanding the proceedings against him and capable of assisting in his own defense, but if the defendant lacks such capacity or requires hospitalization for the treatment of his mental disease or defect, an appropriate court shall commit the accused pursuant to the provisions of § 37.1-67 of the Code of Virginia and, thereafter, the accused shall be subject to the provisions of Title 37.1 with respect to treatment, care, transfer, discharge, and all other applicable sections. However, at least ten days prior to the unconditional release or discharge of such individual charged with a crime, the hospital director shall notify the appropriate court or judge thereof, the appropriate attorney for the Commonwealth and the attorney for the accused of such intended release or discharge.

The fact that the defendant lacks capacity to understand the proceedings against him or lacks capacity to assist in his own defense does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and which may be undertaken without the personal participation of the defendant. However, such proceedings or pretrial hearing shall

be granted only if counsel for the defendant satisfies the court by affidavit or otherwise that as an attorney he has reasonable grounds for a good-faith belief that his client has, on the facts and the law, a defense to the charge other than mental disease or defect excluding responsibility.

As used in this section the term "court" shall be construed to include courts not of record and courts of record. [repealed]

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§ 19.1-229. When question raised by court; commitment after arraignment. – If, at any time after arraignment, a court in which a person is held for trial see reasonable ground to doubt his sanity or mentality at the time at which, but for such a doubt, he would be tried, the court may suspend the trial, declare a mistrial, and then proceed as prescribed in § 19.1-228, all of which action shall be without prejudice to the right of the Commonwealth to retry the accused when his mentality has been determined. [repealed]

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§ 19.1-291. Ascertainment of punishment in criminal cases generally when tried by jury. – The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. [repealed]

§ 19.1-292. Ascertainment of punishment in felony cases. – The term of confinement in the penitentiary or in jail of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, if there be one, or by the court trying the case without a

jury, so far as the term of confinement and the amount of the fine are not fixed by law. [repealed]

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§ 19.2-2. Effect of repeal of Title 19.1 and enactment of this title. – The repeal of Title 19.1 effective as of October one, nineteen hundred seventy-five shall not affect any act or offense done or committed, or any penalty or forfeiture incurred, or any right established, accrued, or accruing on or before such date, or any prosecution, suit or action pending on that day. Except as herein otherwise provided, neither the repeal of Title 19.1 nor the enactment of this title shall apply to offenses committed prior to October one, nineteen hundred seventy-five and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to October one, nineteen hundred seventy-five, if any of the essential elements of the offense occurred prior thereto.

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§ 19.2-299. Investigations by probation officers in certain cases. – When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the con-

tents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case.

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§ 19.2-303. **Suspension of sentence; probation.** – After conviction, whether with or without jury, the court, may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation.

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§ 53-272. **Suspending sentence and placing on probation.** – After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears

compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended.

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§ 53-278.1 **Investigations by probation officers in certain cases.** – When a person is tried upon a felony charge for which a sentence of death or confinement for a period of ten years or over may be imposed and pleads guilty, or upon a plea of not guilty is tried by the court without a jury as provided by law, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made same available to counsel for the accused by furnishing him with a copy of same for his permanent use at least five days prior thereto, shall present his report in open court in the presence of the accused who shall have been advised of the contents of

the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case. [repealed]

In The

Supreme Court of the United States

October Term, 1976

No. 76-1198

MARY LOUISE McCLUNG,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

ANTHONY F. TROY
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The order rejecting the petition for writ of certiorari is set forth in Petitioner's Appendix 1a.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Did the trial court err in sentencing Petitioner on retrial in accordance with the jury's verdict of ten years in the penitentiary when petitioner's first trial resulted in a sentence of only five years in the penitentiary?

2. Does Petitioner have the right to demand a trial by the court without the intervention of a jury?

3. Did the Petitioner's claim of amnesia require the trial court to hold a competency hearing?

STATEMENT OF THE CASE

On November 6, 1976, the petitioner was retried for the murder of Richard Davis. Petitioner requested trial by jury. (Tr. 4). Evidence presented established the petitioner purchased a .38 caliber pistol on April 15, 1972, and received instructions on its use from Melvin E. Mortimer, the store owner, who sold her the pistol. (Tr. 45). Petitioner became proficient in the use of the pistol; the pistol was unloaded when petitioner left the gun shop. (Tr. 45-46).

On the night of May 21, 1972, Marion J. Packett, the next door neighbor of petitioner, heard three shots coming from petitioner's apartment at about 8:00 p.m. (Tr. 52-54). Packett went next door and investigated and encountered petitioner. Petitioner stated to Packett, "May I come in and use your phone. I've just killed a man." Petitioner identified the victim as "my boss . . . he's been harassing me for a long time." Packett observed petitioner's appearance and demeanor. He testified that her clothing appeared neat, no bruises visible and she was not too upset. (Tr. 53).

The police were summoned and Detective Douglas Thomas arrived at the scene, observed Davis' nude body on the upstairs bed in petitioner's apartment, lying face up, with two bullet holes in his left side. (Tr. 58). Petitioner was on the telephone at the time attempting to call her attorney. Thomas advised petitioner of her rights and petitioner told Thomas that the gun was in the closet and offered to show Thomas where it was. (Tr. 59). Thomas observed her appearance as being neat with her hair in a bun, neatly

dressed, no cuts, bruises or any complaint being made by petitioner. (Tr. 60).

Detective Robert Loving arrived shortly thereafter and observed the same neat untrammelled appearance of petitioner. (Tr. 69). Loving located the weapon where petitioner said it would be. (Tr. 71). The weapon was in a linen closet in the hall near the door to the bedroom. (Tr. 71, 85).

Investigation revealed that four shots were fired, two of which caused the death of Davis. (Tr. 79, 120). There was no sign of a struggle in the apartment. (Tr. 88-89). There were no powder burns on the body. (Tr. 120).

The petitioner testified extensively about her long history of visits to psychiatrists, up until 1963. (Tr. 142-148). After the shooting, petitioner was hospitalized and examined by doctors at Towers, located at University of Virginia and by Dr. Blankenship, at Westbrook for evaluations. (Tr. 148-149). She was examined by the psychiatrists for the Commonwealth of Virginia prior to her first trial and found to be sane and capable of standing trial. (Tr. 149, 174). Petitioner claimed loss of memory in her first trial, as well as her second trial. Petitioner was thoroughly examined by the doctors regarding her "amnesia." (Tr. 148, 169-170, 174).

Petitioner testified that Davis was at her apartment when she arrived, that she had broken their marriage engagement, that Davis had abused her in the past mentally and physically and desired abnormal sexual activity when drinking. (Tr. 155-167). Petitioner testified that Davis made demands for sex and pushed her toward the steps leading upstairs. Petitioner struggled with Davis and remembered nothing until she was arrested and sitting in the police car. (Tr. 167-168, 188-189).

Petitioner was examined prior to the second trial by Dr. James Knopp, a psychiatrist. He also heard the peti-

tioner's testimony. (Tr. 211). He testified that it was possible that petitioner had a "disassociated reaction" which was formerly called hysteria, which could possibly be caused by stress, and thus it was possible that petitioner might not remember what happened. He testified that it was possible that petitioner could have amnesia and shot Davis without being aware of it. (Tr. 219-225). Dr. Knopp could only theorize about this occurrence. (Tr. 226).

The jury convicted the petitioner of murder in the second degree and imposed ten years in the penitentiary as punishment. Pursuant to a request by petitioner's attorney, a presentence report was ordered. (Vol. III, Tr. 82).

At the sentencing hearing, the petitioner produced six witnesses, including herself. The court considered that evidence, including the presentence report. (Sentencing Tr. 39). The court entered judgment on the jury verdict and stated that, after considering the record, letters, and witnesses, could find no reason to disturb the jury verdict of ten years. (Sentencing Tr. 49).

ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

I. The Sentence Was Proper

The petitioner assigned as error in the court below that it was error for the trial court to sentence petitioner in accordance with the jury's verdict, which verdict was in excess of the sentence formerly received by petitioner in the first trial for the same offense. Petitioner's assignment of error is based on the fact that the trial court ordered a presentencing hearing and according to petitioner, the court failed to state affirmatively on the record its reasons for imposing the higher sentence.

In 1972, the law in Virginia was that in jury trials, the jury decided guilt or innocence and in guilty verdicts set

the punishment.[1] The trial court was required to pronounce formal judgment on the verdict but had the power to suspend all or part of the sentence imposed.[2] Where trial was by jury, there was no requirement by statute that the judge hear any evidence in mitigation once the jury rendered its verdict.

In the case at bar, petitioner appealed her conviction and

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[1] § 19.1-291. *Ascertainment of punishment in criminal cases generally when tried by jury.*—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law. [Repealed.]

[2] § 53-272. *Suspending sentence and placing on probation.*—After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine. In case the prisoner has been sentenced for a misdemeanor and committed, or in case a jail sentence has been imposed upon the prisoner upon conviction of a felony, the court, or judge of such court in vacation may at any time before the sentence has been completely served, suspend the unserved portion of any such sentence.

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

In any case wherein a court is authorized to suspend the imposition or execution of sentence, such court may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced.

In case the prisoner has been sentenced and committed to the penitentiary for a felony and the sentence is partially suspended, for purposes of good behavior credit and for parole eligibility, the term of imprisonment shall be that portion of the sentence which was not suspended.

sentence of five years she received at her first trial. In the second trial she received ten years by the jury. There is nothing in the record to indicate that the jury knew the prior sentence imposed in the first trial.

The mandates of *North Carolina* v. *Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), have not been violated by the greater sentence imposed on the petitioner in the second trial. Contrary to what petitioner asserts on page ten of her brief, the Court does not ascertain the sentence to be meted out on a finding of guilty by a jury. The court has no power whatever to increase the sentence imposed by the jury. The court can only suspend all or part of it. Thus, the court's discretion is limited within narrow confines.

Pearce holds that on retrial, the court may not impose a greater sentence unless his reasons appear affirmatively on the record. This is to avoid higher sentences based on vindictiveness by the court where a defendant successfully wins a retrial.

In *Chaffin* v. *Stynchcombe,* 412 U.S. 17, 9 S.Ct. 1977, 36 L.Ed.2d 714 (1973), this Court expressly declined to extend the doctrine of *Pearce* to trials by jury:

> The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial.
>
> . . . where improper and prejudicial information regarding the prior sentence is withheld, there is no basis for holding that jury resentencing poses any real threat of vindictiveness. 412 U.S. 26-28.

> The rendition of a higher sentence by a jury upon retrial does not violate the double jeopardy clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a higher sentence, even in the case in which the choice may in fact be 'difficult,' does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction. 412 U.S. at 35.

As previously stated, the record does not show that the jury in the second trial knew of the prior sentence. Thus, under *Chaffin,* the jury was free to impose whatever sentence it deemed proper.

The only other question remaining under this issue is whether the court in pronouncing sentence imposed by the jury committed error by not suspending all punishment in excess of that imposed by the jury in the first trial. Since the court's power at the time this case arose was limited to that of approving the sentence imposed by the jury or suspending all or part of the sentence, the court was powerless to act vindictively as proscribed by *Pearce.* The court could not increase the sentence imposed by the second jury. Respondent respectfully submits that the mere approval of the jury verdict by the court did not amount to vindictiveness by the trial court. The Court did not determine the sentence, it only approved the sentence imposed by the jury.

Assuming, but not conceding for the sake of argument only, that the standards delineated by *Pearce* apply to cases where the jury fixes punishment and the court's power is limited to approval of the verdict or suspending all or part of that sentence, the trial court in this case fully complied with this standard.

After the jury returned its verdict, counsel for petitioner

moved the court for a presentencing report. Although the statute in force at that time did not require the court to do so, the court ordered a presentence report.

The record shows that the trial judge listened to six (6) witnesses for the petitioner at the sentencing hearing, (Sentencing Tr. (S.T.) 3-38), four (4) of whom did not testify before the jury. The record also shows that the presentence report was considered by the judge (S.T. 39), and made a part of the record after having been received on December 23, 1975 (S.T. 1-3); that the petitioner had seen it; and in fact supplemented it (S.T. 2); and that she had no objections to it. (S.T. 39).

One witness, Dr. James M. Knopp, stated that the petitioner could not function on the street in a satisfactory manner in all cases (S.T. p. 25), that she had been hospitalized since the first trial and that "she reacted with a rather extreme panic" to some "purely coincidental things" (S.T. p. 26), and that she seemed to feel cornered in the hospital and that she has been acting that way recently." (S.T. p. 26). Likewise, the judge had the opportunity to review the presentence report which indicated that petitioner's father felt petitioner had a violent temper and that she had had it over the years, and that there was a communication problem in getting information for the said report. Additionally, the Probation Officer did not recommend probation.

The information above is information on the record which was considered by the judge, as well as the entire record of the presentence hearing, and which the jury did not hear. It is objective information concerning identifiable conduct on the part of petitioner which occurred after the time of the original sentence proceeding, which was on the record as required by *Pearce*. *Pearce* has been complied with, although Virginia is, in fact, a jury sentencing

state; there is no requirement that respondent knows of which requires a judge to list his justification for a sentence in A, B, C order. The judge's underlying reasons for using his discretion and not varying the ten year sentence are plainly on the record.

The trial judge was not precluded from imposing a greater sentence than that in the original trial of the petitioner. As stated in *Pearce:*

> We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. 395 U.S. 711, 723.

There is no evidence whatsoever, nor did the petitioner allege at any time during the second trial or at the sentence hearing, that the greater sentence handed down by the second jury was imposed to penalize her for exercising her constitutional right to appeal or as a result of the judge's vindictiveness. Increased sentences are far from being rare and the appeal by petitioner was free and voluntary. Vindictiveness played no part in the greater sentence received in the petitioner's second trial.

II. Petitioner Was Not Compelled By The Trial Court Below To Undergo A Trial By Jury.

Petitioner has assigned as error that petitioner attempted to waive a jury trial and proceed to trial by the judge alone and that by the court's refusal to also waive the jury, forced the petitioner to undergo a jury trial and risk a higher sentence. It should be noted in this regard that the law in Virginia requires that in cases where a defendant pleads "not guilty" and seeks trial by the judge alone, the prosecution and the court must also waive the jury.

At the outset, the respondent would point out that there is nothing in the record to indicate that the petitioner ever

requested a trial by the judge alone. On the contrary, the *petitioner specifically requested trial by jury.* (Tr. 4). Accordingly, respondent submits that this allegation is totally without merit.

Whether the petitioner has the right to demand a trial by the court sitting without a jury has been decided by this Court in *Singer* v. *United States,* 380 U.S. 24:

> . . . Trial by jury has been established by the Constitution as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases.
>
> . . . In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. 380 U.S. at 35-36.

III. The Trial Court Was Not Required To Hold A Competency Hearing On Learning Of Petitioner's Claim Of Amnesia.

Petitioner has alleged that where one suffering from amnesia and other symptoms or behavior which cast doubt on defendant's competency to stand trial, and where this fact is made known to the trial court, that the court is required to conduct a competency hearing as prescribed in *Pate* v. *Robinson,* 383 U.S. 375, 86 S.Ct. 836, 151 S.E.2d 815 (1966) and *Drope* v. *Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

The factual situation in *Robinson* and *Drope* are important to the issue raised in this case.

In *Robinson,* the defendant was convicted of murder and sentenced to life in prison. He had failed to demand a hearing as to his competency to stand trial. His counsel contended throughout the trial that defendant was insane at the time of the offense and at the time of trial. The Court in *Robinson* reviewed the factual situation extensively. The conduct of the defendant was highly indicative of mental impairment. See 383 U.S. at 378-384. There was evidence from many witnesses, which, if believed, would tend to show that the defendant was insane both at the time of the crime and at the time of trial.

In *Drope,* counsel for defendant filed a motion for a continuance in order to obtain a psychiatric examination for defendant, however, no examination was ever made, partially through neglect of defendant's counsel.

The defendant went to trial and testimony from the complaining witness (defendant's wife) indicated mental instability (and possibly insanity). During the trial, defendant shot himself. The trial proceeded in absence of defendant who was in the hospital. Defendant moved for a new trial and testified about why he was absent. In a later motion, evidence was heard from two psychiatrists who testified that, under the factual situation described, the defendant might not have been competent to stand trial.

This Court held that the factual situation, considering the defendant's behavior and other testimony presented, created sufficient doubt of his competence to stand trial and required further inquiry. The fact that the lower court held no hearing was error.

It is pointed out by respondent that *Drope* enunciated the rule concerning competency to stand trial:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. . . .
>
> Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." 420 U.S. at 171, 172.

In the case at bar, petitioner's allegation that because there was some evidence that petitioner may be suffering from amnesia, that the trial court committed error in its failure to hold a hearing. Memory loss complained of by a defendant has always been a convenient defense. Where the factual situation is so strongly against a defendant, lack of memory of what happened is better in some cases than either lying or telling the truth.

The factual situation in this case overwhelmingly proves the guilt of the petitioner. Petitioner had been having trouble with her deceased lover. A few weeks before the murder, she purchased a pistol and became proficient in its use. She and the deceased were alone in her apartment. Four shots were fired from her pistol, two of which were fatal to the deceased. The deceased was found on her bed, nude, the body not having been moved since the shooting. There were no powder burns on the body indicating that some distance separated the deceased from the murder weapon. Petitioner, minutes later appeared to a neighbor neatly dressed, hair neatly placed, untrammelled in appearance and not too upset. Petitioner admitted shooting her boss, and made no complaint about being attacked. The pistol was found outside the room where the body was found, in a

closet which opens into the room where the murder took place. There was no sign of a struggle.

Faced with this kind of evidence, there was no defense readily available to show 1) accident, 2) justification, 3) self-defense or other defense. Quite shrewdly, petitioner feigned loss of memory.

The petitioner has alleged that the trial court should have had a hearing on competency once petitioner alleged amnesia. This contention is without merit because petitioner presented evidence at the trial which tended to show that she was not an amnesiac. Neither *Robinson* nor *Drope* require such hearing on this allegation.

The record of trial reveals that Dr. James M. Knopp, a psychiatrist who had seen petitioner over a long period of time, and heard petitioner testify, testified concerning petitioner's mental condition. (Tr. 208-232). Dr. Knopp testified that petitioner had some mental problems and that it was possible that the shooting *could* have occurred while petitioner was suffering from a "disassociated reaction." He described a "disassociated reaction" as being a situation similar to one where the person is under hypnosis. A person suffering from this would, naturally, not be aware of doing the act in question, or remember what happened at a later date. (Tr. 219-220).

In effect, Dr. Knopp had given results of his examination which was considered by the Court and jury. Respondent submits that the issue raised by petitioner, that the trial court erred in not having a hearing to determine competence, is mooted by this testimony. Whether the petitioner suffered from a disassociated reaction (and amnesia) became an issue of fact to be decided by the jury which was resolved against the petitioner. The Court even instructed the jury on this. (Tr. Vol. 3, pp. 8-9). The jury rejected this evidence, which was proper in light of the Commonwealth's evidence.

Even though there was an examination of the petitioner and testimony concerning petitioner's amnesia, the respondents submit that neither *Robinson* nor *Drope* require the trial court to inquire into the competency of an accused on the bald assertion that the accused is suffering from amnesia and cannot remember what happened at the time the crime was committed.

Where a defendant is charged with a crime and pleads amnesia, how would the state ever bring a defendant to trial? Amnesia alone has not been a basis for finding that an accused was incompetent to stand trial. Moreover, petitioner testified extensively about her prior medical history, her relationship with Davis, the events leading up to the shooting, and the events subsequent to the shooting. She had the presence of mind to call her attorney after the shooting. Petitioner was examined and found competent to stand trial prior to her first trial and there was no evidence to indicate her condition had changed at the second trial.

Respondent has been unable to find any cases decided by this Court on the issue of whether a complaint of amnesia by a defendant is grounds for a finding of incompetency to stand trial. However, numerous United States Circuit Courts of Appeals have held that amnesia alone is not sufficient grounds for a finding of incompetency to stand trial.

In *United States* v. *Knohl,* 379 F.2d 427, *cert. denied,* 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (2nd Cir. 1967), the Court held:

> Where the defendant complains of nothing more than memory difficulties, there is inadequate ground for holding an accused incompetent to stand trial. 379 F.2d 436.

In *United States* v. *Stevens,* 461 F.2d 317 (7th Cir. 1972), the Court held that amnesia was not a bar to an otherwise competent defendant and a competency hearing was not

required where the only basis for incompetency was inability of the defendant to recall events at the time of the crime. See also *United States* v. *Hearst,* 412 F.Supp. 858 (1975); *United States* v. *Sullivan,* 406 F.2d 180 (2nd Cir. 1969); *Daemers* v. *State of Minnesota,* 456 F.2d 1291 (8th Cir. 1972); *United States* v. *Borum,* 464 F.2d 896 (2nd Cir. 1972); *United States* v. *Cowan,* 472 F.2d 1206 (6th Cir. 1972); *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975).

The respondent respectfully submits that the petitioner was fully competent to stand trial in spite of her claim of amnesia. The evidence produced by the Commonwealth establishes petitioner's guilt beyond any reasonable doubt. It is submitted that even if the petitioner had testified to being attacked by the deceased and the killing was in self defense, that testimony would have been rejected as incredible in light of the physical evidence and testimony of impartial witnesses.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

JAMES E. KULP
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States and on the 17th day of May, 1977, I mailed with first class postage prepaid, a true copy of this Respondent's Brief in Opposition to Grant of Certiorari to Phillip J. Hirschkop and Leonard S. Rubenstein, 108 North Columbus Street, Post Office Box 1226, Alexandria, Virginia 22313.

JAMES E. KULP

Assistant Attorney General